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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 973

FRED J. HOWARTH,

Petitioner,

vs.

MAE K. HOWARTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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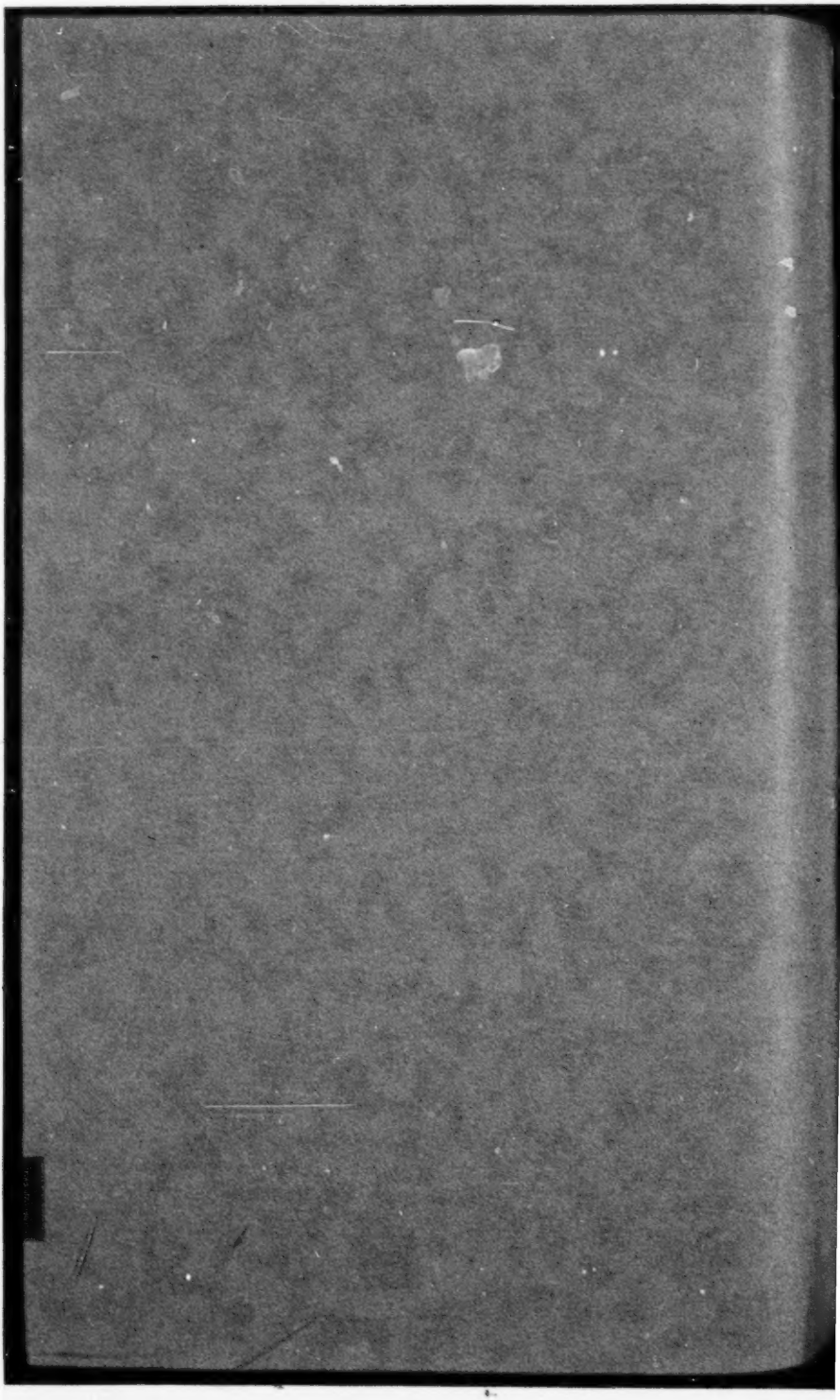

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PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Fred J. Howarth for a writ of certiorari directed to the District Court of Appeal of the State of California, Second District, Division One, respectfully shows to this Honorable Court:

A.

The opinion of the District Court of Appeal of the State of California is reported in 146 A. C. A. 752, 304 P. 2d 147.

B.

(I) The decree sought to be reviewed was dated December 10, 1956, and was filed on said day. [Tr. of R., Opin. of Dist. Ct. of App., p. 1.] Thereafter, and

within the time allowed by the "Rules on Appeal" adopted by the Judicial Council of the State of California effective July 1, 1943, as amended effective January 1, 1951, your Petitioner filed a petition in the Supreme Court of the State of California for a hearing in that court, which petition was duly considered by that court and denied on and filed on February 6, 1957. [Tr. of R., Order Denying Hearing, p. 1.] A petition for a writ of certiorari presented to this Honorable Court within three months thereafter is in time.

American Ry. Express Co. v. Levee, 265 U. S. 19, 21, 68 L. Ed. 140.

(II) No order was made respecting a rehearing and no order has been sought or obtained granting an extension of time within which to petition for a writ of certiorari.

(III) The jurisdiction of this Honorable Court is invoked under 28 United States Code, sections 1254 and 1257, and section 237(b) of the Judicial Code (28 U. S. C. A., sec. 344(b)).

C.

The questions presented for review are as follows:

The validity of the decree of Utah having been conceded by both Petitioner and Respondent, was the decision of the District Court of Appeal of the State of California erroneous:

(a) In refusing to give Full Faith and Credit, as required by the provisions of Article IV, section 1, of the Constitution of the United States to the Utah decree;

(b) In construing the decree of the Utah court under the laws of California and in failing to note that since

February 25, 1954, or at least since the final decision of the Supreme Court of California in *Worthley v. Worthley,* 44 Cal. 2d 465, that it is mandatory under California law that the law of the foreign state be applied in construing the judgments of such states where property settlement and separation agreements are presented in divorce actions and acted upon by the trial courts in such foreign jurisdictions;

(c) In failing to note that at no time has the Utah decree been construed under the constitution, laws and decisions of Utah;

(d) In holding that because of some factual differences seen by the court in *Worthley v. Worthley,* 44 Cal. 2d 465, and in *Flynn v. Flynn,* 42 Cal. 2d 55, the broad principles of law laid down in those cases need not be applied in construing the Utah decree here;

(e) In holding, in effect, that a property settlement and separation agreement, no matter how acted upon by a court of a foreign jurisdiction, cannot be incorporated in its judgment in a divorce proceeding unless the language used is sufficient to hold the parties thereto in contempt of court in the event of failure to perform in accordance with the terms of the agreement, and thereby violating the provisions of Article IV, section 1, of the Constitution of the United States;

(f) In failing to note that the Supreme Court of Utah, relying on *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, and other decisions cited, has held, in *Smith v. Smith,* 77 Utah 60, 66, ". . . that the final judgment in an action granting a divorce settles all property rights of the parties, *and is a bar to action afterwards by either of the parties to determine the question of alimony or any*

property rights which might have been settled by such judgment" (Emphasis added);

(g) In holding that the denial of certiorari by the United States Supreme Court is a determination by that court adversely to the Petitioner of the matters presented by his petition;

(h) In holding, contrary to the provisions of Rule 29 of "Rules on Appeal" adopted by the Judicial Council of the State of California effective July 1, 1943, as amended effective January 1, 1951, that the denial of a hearing by the Supreme Court of the State of California is an adverse determination by that court of the matters set forth by Petitioner in his petition.

D.

The constitutional provisions which the case involves are to be found in Article IV, section 1, of the Constitution of the United States and the decisions thereunder, particularly the following:

Roche v. McDonald, 275 U. S. 449, 451, 72 L. Ed. 365, 368;

Riley v. New York Trust Co., 315 U. S. 343, 348, 349, 86 L. Ed. 855, 891;

Union National Bank v. Lamb, 337 U. S. 38, 93 L. Ed. 1190.

Said section of the Constitution is as follows:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

E.

STATEMENT OF THE CASE.

This Petition Presents Facts Disclosing a Failure and Refusal by the State of California to Give Full Faith and Credit to a Final Judgment Duly Rendered and Existing in the State of Utah and That Thereby the Provisions of Article IV, Section 1, of the Constitution of the United States Have Been Violated.

Respondent's complaint was for money alleged to be due from Petitioner under a property settlement which provided for "weekly payments" "for the support of the wife." [Tr. of R., Clk. Tr. p. 10, lines 1-2.]

Said agreement was attached to and made a part of the action filed by Petitioner in the year 1943 in the District Court of the Third Judicial District, in and for Tooele County, State of Utah, entitled *Fred J. Howarth v. Mae K. Howarth,* and by its judgment of June 2, 1943, after finding that "defendant had made and filed herein a written admission of service of process and waiver of the time allowed by law for her to answer or otherwise plead to the complaint on file herein" [Tr. of R., Clk. Tr. p. 4, lines 19-21], the court then "Ordered, Adjudged and Decreed as follows: 1. . . . 2. That the property settlement and agreement attached to the complaint on file herein which has been entered into by and between the parties hereto relative to their property is hereby confirmed and approved." [Tr. of R., Clk. Tr. p. 5, lines 2-8.]

On May 23, 1952, Petitioner filed his demurrer to Respondent's complaint. Hearing was not held thereon until June 11, 1954, at which time Petitioner appeared in the Superior Court of the State of California, in and for

the County of Los Angeles, Pasadena B, Honorable Kurtz Kauffman, Judge Presiding, and stated to the court that the jurisdiction question raised by Petitioner's demurrer had been raised unsuccessfully in two previous actions in the courts of California where, as seen by Petitioner, the laws of California had been solely applied in construing the judgment of the Utah court but that the California Supreme Court had finally ruled, on February 25, 1954, in *Worthley v. Worthley,* 42 A. C. 342, as to what law must be applied in construing decrees of other states in reference to property settlement agreements which had been presented to and ruled upon in divorce actions, and Petitioner then read to the court from 42 A. C. at page 345 the following:

> "The question to be determined is the effect of the Nevada divorce decree upon the prior New Jersey decree for separate maintenance. Both parties rely primarily upon California law to answer the question. (1) The disposition of this case requires reference to the law of New Jersey."

Petitioner then stated to the court that the decision of the Appellate Court in the first *Howarth* case (*Howarth v. Howarth,* 81 Cal. App. 2d 266) applied California law in construing the decree of the Utah court against merger because the language used was insufficient to sustain a contempt of court citation but that there was no such requirement under Utah law or decisions; and that in the second *Howarth* case (115 Cal. App. 2d 769) the jurisdictional question again raised there was disposed of by failing to construe the Utah decree in any manner, the court being of the opinion that it was not "at liberty" to do so and that the court there construed the agreement rather than the Utah decree and applied the principle

of estoppel because of the fact the agreement provided for installment payments, citing "15 Cal. Jur. p. 156, Sec. 202 and cases there cited." (The court did inferentially sustain the ruling in the first *Howarth* case by stating that if it were "at liberty" it saw no reason to depart from the views expressed upon the prior appeal.)

Ordinarily, statements made by the trial court on a hearing upon demurrer would not be construed as of great or controlling importance but in the light of the decision of the District Court of Appeal of the State of California, as to which a Writ of Certiorari is now sought in this Honorable Court, the statements made by the court upon the hearing upon demurrer become of very great importance after considering the statements made by Petitioner (as hereinbefore set forth) and the argument of counsel for Petitioner. As no court reporter was present, Petitioner must rely upon the substance of the statement made by the court, as follows:

> "I am inclined to agree with you. It looks to me that, as the Supreme Court has stated in the *Worthley* case, recourse must be made to the law of the state rendering the decree but the difficulty that confronts me here is that there are two decisions of the District Court of Appeal against you and, as trial judge, I doubt that I should rule contrary thereto. As I see it, you have never obtained a ruling from the Supreme Court, although you have applied for hearings. I think you must, of necessity, find some way to get a hearing by that court where you can ask for an application of the ruling in the *Worthley* case to your case. I will, however, take the matter under submission in order to read the *Worthley* case."

On June 14, 1954, the trial court made its order, overruling the demurrer without opinion.

Trial was held on June 2, 1955.

At the conclusion of the trial, Petitioner asked the trial court to take note that at the conclusion of the said hearing on demurrer to plaintiff's complaint, that Petitioner had requested that the court take notice that on the questions of jurisdiction, particularly if arising, as here, under the Full Faith and Credit Clause of the Federal Constitution, both trial and appellate courts has been known to make very serious mistakes by insisting upon applying the law of the forum in construing foreign decrees and that, in a typical case, seven justices of a Supreme Court (Missouri) had solemny declared, on July 12, 1948, that the law of the forum "would be applied in Missouri in construing a Colorado judgment and that this holding . . . does not run counter to the full faith and credit provision of the Federal Constitution" (*Union National Bank v. Lamb,* 358 Mo. 65, 213 S. W. 2d 416), but that nine justices of a higher court, in reversing said holding, had held, in effect, that seven justices of a state court (as stated by counsel): "Had never been more wrong in their lives." (*Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190.)

Petitioner then directed the attention of the trial court to the fact that the decision of the California Supreme Court of February 25, 1954, in *Worthley v. Worthley,* 42 A. C. 342, had been superseded by its decision of April 28, 1955, in *Worthley v. Worthley,* 44 Cal. 2d 465, but that as to the point relied upon by Petitioner, the court still held that: ". . . obligations under the New Jersey maintenance decree must be determined by the law of New Jersey." (The principal difference between the words

quoted and those in the first decision being the addition of the mandatory "must.")

On August 19, 1955, the trial court made its Findings of Fact and Conclusions of Law.

The court found that it was untrue that the "rendering of judgment herein . . . under said property settlement agreement will impair in any manner the integrity of said Utah decree *or will violate in any manner the provisions of Article IV, Section 1, of the Constitution of the United States,* as said Utah decree will not be thereby *denied all the Full Faith and Credit to which it is entitled.*" (Emphasis added.) [Tr. of R., Clk. Tr. p. 33, line 32, to p. 34, line 6.] And that it was untrue that " . . . this action brought by plaintiff herein under said contract, and any judgment rendered by this Court, violate the Constitution and laws of the State of Utah, . . . and it is untrue that any such judgment will deny to the defendant herein rights guaranteed to him by the provisions of subdivision 1 of the Fourteenth Amendment to the Constitution of the United States and by the provisions of section 13, Article I, of the Constitution of the State of California." [Tr. of R., Findings, par. V; Clk. Tr. p. 34, lines 7-15.]

The trial court, at the request of Petitioner, also made a special finding as follows:

> "That throughout the proceeding in the above entitled Court the defendant has tendered for decision his rights under the Federal Constitution and Laws, and under the Constitution and laws of the State of Utah, and the Constitution and laws of the State of California, and they have been duly considered by the above entitled Court and decided adversely to the contentions of defendant." [Tr. of R., Findings, par. X; Clk. Tr. p. 35, lines 16-21.]

The Conclusions of Law followed said Findings and judgment was entered that Respondent recover from Petitioner the sum of $4,725.00 and costs. [Tr. of R., Clk. Tr. p. 38, lines 1-32.]

Petitioner appealed from the judgment of the trial court to the District Court of Appeal, Second District, State of California, which court, on the 10th day of December, 1956, rendered its decision affirming the judgment of the trial court. [Tr. of R., Opin. of Dist. Ct. of App., pp. 1-7.] Thereafter, and within the time provided under the laws of the State of California, Petitioner filed his petition in the Supreme Court of the State of California, praying that a hearing be granted in said court after the decision of the said District Court of Appeal, which petition was denied by said Supreme Court on the 6th day of February, 1957. [Tr. of R., Order Denying Hearing, p. 1.]

Although the question was directly placed before it by Petitioner upon his appeal to the District Court of Appeal, that court refused to rule as to whether the trial court failed to give to the decree of the Utah court the full faith and credit to which it was entitled and has thereby violated the Constitution of the United States.

In its opinion, the District Court of Appeal, after referring to its earlier decisions, stated in part as follows:

> "Appellant's theory now, apparently, is that in the light of Worthley v. Worthley, 44 Cal. 2d 465, and Flynn v. Flynn, 42 Cal. 2d 55, the trial court erred in (1) determining under the laws of California the rights of the parties under the Utah decree; (2) concluding that the property settlement agreement was not by the Utah court incorporated nor made an operative part of the decree of divorce therein rendered; (3) concluding that the payments were not in

the nature of alimony but were by the way of property settlement and (4) the court did not give full faith and credit to the Utah decree, contrary to the provisions of Article IV, Section 1 of the Constitution of the United States." [Tr. of R., Opin. of Dist. Ct. of App., p. 3.]

F.

At the outset, Petitioner raised in the trial court the question of his rights under the Full Faith and Credit Clause of the Federal Constitution. This was done by demurrer to plaintiff's complaint. [Tr. of R., Clk. Tr. p. 15, lines 12-21.]

Petitioner, by said demurrer, not only asserted his rights under the Constitution and Laws of Utah as to modification of the support provisions of the Utah judgment, but also insisted that the action brought in California, not upon the Utah judgment but upon the property settlement agreement which, under Utah law had become merged in said judgment and had no longer an independent existence, could not be sustained as ". . . any judgment rendered (herein) attempting to do so will violate the provisions of Article IV, section 1, of the Constitution of the United States . . ." [Tr. of R., Clk. Tr. p. 15, lines 12-21.]

Petitioner's demurrer having been overruled, he filed his answer to Respondent's complaint wherein he expressly alleged that, it being conceded by all parties that the Utah court had jurisdiction of the parties and the subject matter ". . . neither the courts of California, nor of any other State of the United States, may impeach the said Utah decree, nor determine, under the law of the forum, the construction or effect of the said Utah decree, nor impair its integrity by failing to give it full faith

and credit, without violating the provisions of Article IV, section 1, of the Constitution of the United States." [Tr. of R., Clk. Tr. p. 20, lines 16-21.]

Throughout the trial in the Superior Court, Petitioner continued to assert his said rights.

Notwithstanding the fact that, as stated by the trial court in its findings that it did consider the rights tendered for decision under the Full Faith and Credit Clause of the Federal Constitution, and had decided "adversely" to the contentions of Petitioner [Tr. of R., Clk. Tr. p. 35, lines 16-21], the District Court of Appeal refused to consider the appeal, or to rule upon, the question squarely before it, namely, whether the trial court had denied the full faith and credit to which the Utah judgment was entitled under the rule laid down in *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190.

As hereinbefore stated, Petitioner made no attempt to have his rights under the Full Faith and Credit Clause of the federal Constitution determined by either the trial court or the District Court of Appeal in the case entitled *Howarth v. Howarth,* 81 Cal. App. 2d 266. Notwithstanding that such question was neither presented nor passed upon by either of said courts, Petitioner for the first time in said earlier case attempted to raise such question by petition to the California Supreme Court for a hearing, which was denied by a divided court, and by subsequent petition to this Honorable Court for a writ of certiorari, which was denied (333 U. S. 842, 92 L. Ed. 1126); and as hereinbefore stated, the District Court of Appeal in the later case felt that because of its prior decision that it was not "at liberty" to pass upon the question presented and that the principle of "estoppel" should be applied.

H.
ARGUMENT.

Under this heading, Petitioner feels he can aid this Court best in determining error by the District Court of Appeal of the State of California, so serious as to warrant the issuance by this Honorable Court of the writ prayed for, by setting forth here the law and the facts which establish the errors set forth in the foregoing questions presented on review. They are as follows:

POINT ONE.

The District Court of Appeal of the State of California Failed to Note That Under the Decision of the Supreme Court of the State of California in Worthley v. Worthley, 44 Cal. 2d 465, It Is Now Mandatory Under California Law That the Law of the Foreign State Be Applied in Construing Its Decrees Where Rights and Obligations, as Here, Are to Be Determined.

The Supreme Court of California emphatically held, on February 25, 1954, that "the disposition of this case requires reference to the law of New Jersey . . . (4) To give Full Faith and Credit to both these decrees we resort to New Jersey law to determine what effect must be given . . ."; and on rehearing on April 28, 1955, for all practical purposes reached the same conclusion by use of the words ". . . the effect of the dissolution of the marriage on defendant's pre-existing obligations must be determined by the law of New Jersey. (Citations.)" (*Worthley v. Worthley,* 44 Cal. 2d 465.)

Petitioner contends that, applying the rule laid down in the *Worthley* case, it is only the Utah court that can say what it intended as to merger when it caused the judgment to declare that said agreement was confirmed

and approved after noting that a true copy of the agreement providing for a division of property and for support payments for the defendant wife "during the remainder of her lifetime," [Tr. of R., Clk. Tr. p. 9, line 10], and containing a waiver by the defendant wife of "any right to receive alimony . . . except as in this agreement provided" [Tr. of R., Clk. Tr. p. 10, lines 28-32] had been attached to the plaintiff's complaint.

The Supreme Court of the State of California also states, in the *Flynn* case:

> "In the absence of an express order to perform all or any part of the agreement, it may be difficult to determine whether or not a merger was intended (citing 5 California cases and 1 Armstrong Family Law)." (*Flynn v. Flynn,* 42 Cal. 2d 55.)

Petitioner contends *that under the laws and decisions of the Supreme Court of the State of Utah, as hereinbefore and hereinafter set forth, no such difficulty exists* but that, in any event, under the rule in the *Worthley* case any such difficulty as to the construction of a Utah judgment by the courts of California must be met by reference to the law of Utah and not by reference to the laws of California.

Notwithstanding Petitioner's contentions and the broad principles of law laid down in these new cases, the District Court of Appeal of the State of California concluded that they need not be applied here because of factual differences found by it in the *Worthley* and *Flynn* cases and because of its erroneous belief that the Supreme Court of the United States and the Supreme Court of California had ". . . twice decided . . ." the matters presented on this appeal. [Tr. of R., Opin. of Dist. Ct. of App., p. 7.]

POINT TWO.

The District Court of Appeal of the State of California Has Failed to Note That the Utah Decree Has at No Time Been Construed Under the Laws of the State of Utah.

As has hereinbefore been pointed out in some detail, the decision of the District Court of Appeal of the State of California was predicated upon the application of California law to the construction of the Utah decree. The court, after noting in the first case that the Utah decree did "not contain any direction or order for the payment of any sum of money, nor does it direct the plaintiff to perform the terms of the agreement" concluded:

> *"The decree herein is therefore not only legally insufficient to warrant the docketing of any money judgment against the plaintiff, but is wholly insufficient to support contempt proceedings."* (Emphasis added.) (*Howarth v. Howarth*, 81 Cal. App. 2d 266.)

In support of said holding, the District Court of Appeal in said case cited *Lazar v. Superior Court*, 16 Cal. 2d 117, where the Supreme Court of California was called upon to determine ". . . whether the agreement was sufficiently incorporated in the decree *to justify a contempt citation* for disobedience . . ." (Emphasis added.) (*Howarth v. Howarth*, 81 Cal. App. 2d 266.)

Conceding that then and now it had been established by *stare decisis* that merger would not take place under a California decree unless the decree contained language sufficient to "support contempt proceedings," Utah did not and does not have any such requirement, by *stare decisis* or otherwise.

In the second *Howarth* case the court indicated it was not "at liberty," because of the earlier decision, "to re-examine the questions sought to be presented." The court, therefore, refused to pass upon the jurisdictional question presented to it which required the construction of the Utah decree but, instead, elected to construe the contract itself as being an installment contract and decided, under the authority of "15 Cal. Jur., page 156, sec. 202 and cases there cited" that a ruling as to one installment created an estoppel under California law as to all subsequent installments. The court, in conclusion, declared that if it had been "at liberty" that it would still have held to its prior views.

Thus we see that all the laws of Utah had been relied upon by Petitioner and placed before the court in both of said cases but they were not applied because of the court's reliance upon California decisions.

It is true that at the time, in each case, there was no California decision in what might be designated as "property-settlement-merger" case which held that decrees of sister states "must" be determined in each instance by the law of such states. (*Worthley v. Worthley,* 44 Cal. 2d 465.)

POINT THREE.

The Decree of Divorce Between Petitioner and Respondent in This Case Was Rendered by the Utah Courts. The Property Settlement and Separation Agreement Described in Respondent's Complaint Herein Was Attached to and Made a Part of Plaintiff's Complaint in the Utah Proceeding and the Utah Court, in Its Decree, Expressly Declared That It Was "Confirmed and Approved."

A determination of the effect of said decree, and particularly of the question as to whether said agreement merged in said decree, must be reached by applying Utah laws. It has been expressly so held in the following cases:

Estate of Sanders, 147 A. C. A. 546;

Worthley v. Worthley, 44 Cal. 2d 465.

POINT FOUR.

Unlike California, Utah Does Not Require by Its Law and Decisions That the Divorce Decree Must Order the Defendant to Perform the Terms of the Agreement on His Part to Be Performed In Order to Effect Merger of the Agreement With the Decree.

Contrary to what appears to be the rule in California, Utah has no requirement that the decree of divorce must order the defendant to perform the terms of the property settlement agreement in such manner as will sustain a contempt of court citation if he fails to perform.

The Supreme Court of Utah has expressly held that all questions of support and alimony are necessarily determined and settled by the decree. We quote as follows:

". . . that the final judgment in an action granting a divorce settles all property rights of the parties

and is a bar to action afterwards by either of the parties to determine the question of alimony or any property rights which might have been settled by such judgment." (Emphasis added.) (*Smith v. Smith*, 77 Utah 60, 66, 291 Pac. 298.)

Petitioner contends that because both he and the Respondent herein voluntarily appeared before the courts of the State of Utah and submitted themselves to such jurisdiction in a divorce proceeding where the property settlement and support agreement was presented to the trial court as a part of the complaint, and a finding made thereon after trial and confirmed and approved by express words in the divorce decree, that he thereby acquired, under Utah law, rights that would be lost to him if it be established in California, by application of its laws *in re* contempt or otherwise, that the Utah decree be construed as not having merged with the agreement, thus leaving the Utah courts without power to modify the said agreement for any reason.

The value to him, under Utah law, of the right to appeal to its courts for modification or other relief is regarded by Petitioner as a valuable one which he desires to maintain. This is particularly true because of many conditions that have radically changed since the date of said agreement; not the least of which is that the children mentioned in said agreement have long since reached their majorities and have married and maintain homes of their own.

Petitioner has the right, pursuant to the provisions of Section 1212, Comp. Laws 1907, of the State of Utah,

to appear before the courts of that state from time to time for the purpose of seeking modification of payments for the support of Respondent herein. Those rights may not be denied him without violating the provisions of subdivision 1 of the Fourteenth Amendment to the Constitution of the United States, as well as the provisions of Article I, Section 13, of the Constitution of the State of California. This Honorable Court held many years ago in a similar proceeding that the courts of California had violated the Constitution of the United States in determining that a separate maintenance decree entered in Illinois was not conclusive in the courts of California in a subsequent divorce action. This Honorable Court said:

> "But conceding without deciding that the Californi law is as asserted, the proposition of fact upon which the argument rests amounts simply to denying all effect to the Illinois decree." (*Harding v. Harding,* 198 U. S. 317, 338, 49 L. Ed. 1075.)

The District Court of Appeal, in holding that Petitioner has no such right, has ignored the Constitution and laws of the State of Utah and has wrongfully construed the Utah judgment through the application of California laws and decisions.

POINT FIVE.

The Full Faith and Credit Clause Requires That Judgments of the Courts of One State Be Given the Same Full Faith and Credit in All the Other States That They Have by Law or Usage in the State Granting the Judgment.

It has been expressly so held in the following cases:

Morris v. Jones, U. S. S. Ct. Adv. Op. Vol. 91, No. 6, pp. 399, 401, 403;

Riley v. New York Trust Co., 315 U. S. 343, 348, 349, 86 L. Ed. 885, 890.

POINT SIX.

The District Court of Appeal Has Erroneously Concluded That Because of Petitions to the United States Supreme Court for the Issuance of Writs of Certiorari and Petitions for Hearing by the California Supreme Court That the Jurisdictional and Other Questions Presented ". . . Have . . . Already Been Twice Decided by the Supreme Court of California and the United States Supreme Court."

This is an ancient error which strangely persists through the years, one which is believed to be true by many of the profession and which occasionally is found in the opinions of high courts.

The effect of the granting or denial of certiorari by the United States Supreme Court was stated some twenty years ago by Charles Evans Hughes in an address before the New York City Bar Association or the New York State Bar Association at a time when he was Chief

Justice of this Honorable Court. His exact words are beyond full recall but, in substance, he said:

> "The granting or denial by the United States Supreme Court of the writ of certiorari does not, as counsel have been told over and over again, express an opinion by the court in any manner whatsoever as to the merits of the cause."

The error of the District Court of Appeal in stating that the matters presented were "twice decided by . . . the United States Supreme Court" becomes apparent.

Petitioner cannot see that the rule can be any different as to a petition to the Supreme Court of California for a hearing after decision by the District Court of Appeal where the sole action taken by the Supreme Court of California was, as stated in the first *Howarth* case:

> "Order Denying Petition for Hearing.
>
> "Appellant's petition for hearing denied.
>
> "Carter, J. and Schauer, J., voting for a hearing."

POINT SEVEN.

Petitioner Contends That the Questions Involved Are Substantial.

Petitioner desires to direct the attention of this Honorable Court to the fact that the questions presented herein are of nation-wide importance and are very similar in certain aspects to one or more of the questions presented in *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190; and in *First National Bank of Chicago v. United Air Lines, Inc.,* 96 U. S. S. Ct. (L. Ed. Adv. Ops.) 360.

In the *Union National Bank* case, the Supreme Court of Missouri, on June 12, 1948, construed a Colorado judgment by applying Missouri law. As to the appellant's contention that the Full Faith and Credit Clause was thereby violated, it said:

> "In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. *This does not run counter to the full faith and credit provision of the federal constitution,* because, as we have seen, the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum." (Emphasis added.) (*Union National Bank v. Lamb,* 338 Mo. 65, 213 S. W. 2d 416.)

This solemn pronouncement by a unanimous state court was set aside *in toto* by a unanimous decision of this Honorable Court. (*Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190, 69 S. Ct. 491.)

This case presents a question of fundamental importance under the Full Faith and Credit Clause in reference to the judgment of one state, predicted upon a contract between husband and wife, concerning "payments for the support of the wife," and the construction and interpretation of said judgment by the courts of a sister state, which construction and interpretation were based upon its laws and not upon the laws of the state rendering the judgment.

There is no question here as to the validity of the Utah judgment as both Petitioner and Respondent have at all times proclaimed its validity. The court had personal jurisdiction over both parties and therefore had the power to enter a valid personal judgment. (*Pennoyer v. Neff,* 95 U. S. 714.)

The action of the California courts here, if allowed to stand, would establish a precedent whereby all courts in all states could circumvent the operation of the Full Faith and Credit Clause by simply stating that "we refuse to consider and rule upon the question presented, as to whether the trial court failed to give Full Faith and Credit to the judgment of the sister state, even though the trial court expressly considered such question and ruled thereon adversely to appellant."

There, as here, the sole authority relied upon by the appellate court for such failure and refusal is reference to an earlier decision, where no question under the Full Faith and Credit Clause was ever presented, considered or passed upon, then we have reached a situation where any state court may disregard the provisions of the federal Constitution by saying, as was done by Missouri in the *Lamb* case: "It is a question of enforcement of a foreign judgment and we will construe it in accordance with the law of the forum," or, as here, by simply stating that the question presented under the federal Constitution just will not be considered.

The extreme danger of any such precedent is apparent here, for your Petitioner is protected, under the Constitution and laws of the State of Utah, and particularly by the provisions of Section 1212, Comp. Laws 1907, of that state, if all states are required to give full faith and credit to the judgment rendered by Utah in his favor in this that, from time to time, as circumstances or conditions warrant it, he may appear before the courts of that state and seek modification of the support provisions embodied in the divorce decree, as provided by its laws; whereas, this right has been completely and effectively and finally, except for the intervention of this Honorable Court, de-

nied him by the courts of California in construing said decree in accordance with its laws, which are not in accord with the laws of Utah as to the merging of a property settlement and support agreement in judgment. California, by *stare decisis* only, insists that the language used in the judgment must be sufficient to sustain a contempt of court proceeding against the party failing to perform thereunder. Utah has no such requirement.

Conclusion.

Petitioner presents here highly important problems in reference to property rights and the right of maintenance arising out of the marriage relation, as well as important questions affecting all states in reference to what sort of full faith and credit shall, under the Constitution of the United States, be given decrees of sister states dealing with such matters, and presents the important question of the right of the District Court of Appeal of the State of California, because of the erroneous beliefs stated in its decision, to refuse to consider and pass upon the question whether the trial court has, by judgment rendered, denied full faith and credit to a judgment of a sister state, particularly where, as here, the trial court not only had such question presented to it but has certified that it considered it and ruled upon it adversely to the contention of the party asserting rights thereunder.

Petitioner prays that his petition for a writ of certiorari be granted and that the judgment below be reversed.

Respectfully submitted,

LAWRENCE M. CAHILL,
Attorney for Petitioner.

APPENDIX.

Rule 23(i).

Opinion of the District Court of Appeal.

[Civ. No. 21677. Second Dist., Div. One. Dec. 10, 1956.]

Mae K. Howarth, Respondent, v. Fred J. Howarth, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Kenneth C. Newell, Judge. Affirmed.

Action to recover accrued installments due under a property settlement agreement. Judgment for plaintiff affirmed.

L. M. Cahill for Appellant.

William J. Donahue for Respondent.

FOURT, *J.*—This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $4,725.

The plaintiff brought this action to recover accrued installments due under a property settlement agreement, executed by the parties hereto, which has been the subject of two previous actions. The first of such actions was brought in January, 1945, and was to collect $2,640. allegedly due under the property settlement agreement. Judgment was rendered in favor of the plaintiff and affirmed upon appeal in this court. (Howarth v. Howarth, 81 Cal. App. 2d 266 [183 P. 2d 670].) A petition for a hearing by the Supreme Court was denied and the United States Supreme Court denied a petition for a writ of certiorari.

The second of such actions was started about May 1, 1946, and was to collect $6,615, due under the property settlement agreement. Judgment was rendered in favor of the plaintiff and affirmed upon appeal in this court.

(Howarth v. Howarth, 115 Cal. App. 2d 769 [252 P. 2d 743].) A petition for a hearing by the Supreme Court was denied and thereafter, the United States Supreme Court denied a petition for a writ of certiorari.

Appellant now, for all intents and purposes, makes the identical contentions as were made in the second appeal and substantially the same contentions which he made in the first appeal. Each and every contention heretofore raised by the appellant has been decided against him. No useful purpose would be served in setting forth a résumé of the two previous decisions, and to do so would but consume useful space and unduly enlarge this opinion.

In Howarth v. Howarth, *supra*, 115 Cal. App. 2d 769, at page 770, the court stated: "Briefly stated, appellant's primary contention is that the agreement sued upon was incorporated and merged in the decree granted by the District Court in and for Tooele County, Utah, in the divorce action between the parties, and as corollary thereto (a) that the payments under said agreement were in the nature of alimony and hence subject to modification by the Utah court, and (b) any attempt by a California court to enforce payment thereof constitutes a violation of the full faith and credit clause of the federal Constitution. In the previous action between the parties heretofore adverted to, the Superior Court in and for the County of Los Angeles decided each of these contentions adversely to appellant, and, as stated, upon appeal this judgment was affirmed. Hence appellant is estopped from relitigating the same questions in the instant proceeding."

Appellant's theory now, apparently, is that in the light of Worthley v. Worthley, 44 Cal. 2d 465 [283 P. 2d 19], and Flynn v. Flynn, 42 Cal. 2d 55 [265 P. 2d 865], the

trial court erred in (1) determining under the laws of California the rights of the parties under the Utah decree; (2) concluding that the property settlement agreement was not by the Utah court incorporated nor made an operative part of the decree of divorce therein rendered; (3) concluding that the payments were not in the nature of alimony but were by the way of property settlement and (4) the court did not give full faith and credit to the Utah decree, contrary to the provisions of article IV, section 1 of the Constitution of the United States.

In the Flynn case, *supra*, (p. 57) the property settlement agreement provided that in any action for divorce brought by either party " 'this agreement may be approved by [the] court and that the terms and provisions hereof may be made and become a part of and incorporated in any decree which may be made by such court, and the parties ordered to comply with the provisions thereof.' " The decree provided that "The property settlement agreement between the parties hereto dated October 11, 1941, and received in evidence herein, is hereby ratified, approved and confirmed and the same is hereby specifically incorporated herein and made a part of this decree, and defendant is hereby ordered to make all of the payments provided therein to be paid by him, at the times and in the manner therein provided, and plaintiff and defendant are hereby ordered to comply in all respects with each and all of the terms and provisions of said agreement and to perform all their obligations thereunder as therein provided." The Supreme Court held that there could be no doubt as to the intent of the parties and the court that a merger should occur; that a property settlement agreement may be incorporated in a judgment or decree by reference, and that an examination of the property

settlement incorporated by reference in the interlocutory decree made it clear that it was an "integrated bargain" and subject to modification only according to the terms contained therein.

A comparison of the language used in the property settlement agreement and judgment in the instant case with that in the Flynn case discloses that there is no similarity whatsoever between the two. In the case before us the decree merely recites that the "property settlement and agreement attached to the complaint on file herein which has been entered into by and between the parties hereto relative to their property is hereby confirmed and approved." As stated in Flynn v. Flynn, *supra*, at page 58: ". . . the parties may intend only to have the validity of the agreement established, and not to have it become a part of the decree enforceable as such." (Citing Howarth v. Howarth, *supra*, 81 Cal. App. 2d 266, 272.) And, "If a merger is not intended, the purpose of incorporation will be only to identify the agreement so as to render its validity *res judicata* in any subsequent action based upon it." (Citing Howarth v. Howarth, *supra*, 81 Cal. App. 2d 266, 272.)

In Worthley v. Worthley, *supra*, 44 Cal. 2d 465, the holding is concisely set forth in the concluding paragraph of the main opinion at page 474: "Accordingly, we hold that foreign-created alimony and support obligations are enforceable in this state. In an action to enforce a modifiable support obligation, either party may tender and litigate any plea for modification that could be presented to the courts of the state where the alimony or support decree was originally rendered."

There is nothing in the holdings in Lubin v. Lubin, [1]144 Cal. App. 2d —— [302 P. 2d 49], and Foust v. Foust, [2]47 Cal. 2d —— [302 P. 2d 11]; cited by appellant, or in Flynn v. Flynn, *supra*, and Worthley v. Worthley, *supra*, which is in any wise contrary to those set forth by this court in the two prior actions on the property settlement agreement which is the subject of the instant action.

It would appear to us that the appellant in this case is insistent that he will not comply with his agreement to pay under the property settlement agreement unless he is compelled to do so by court action. The plaintiff herein has now been compelled to bring three separate actions for a total of about $13,980, representing approximately seven and a half years of delinquencies on the part of appellant.

As already pointed out, there is no doubt in our mind that all of the points raised by appellant have heretofore been determined against him at least once, and most of them twice. In our opinion the appeal is without any semblance of substance and is a proper case to impose a penalty against the appellant as is provided for under rule 26a, Rules on Appeal and section 957 of the Code of Civil Procedure. We are thoroughly familiar with the holdings to the effect that appellate courts are reluctant to hold that an appeal is frivolous; at the same time we are convinced that the appellant here has, by this appeal, imposed a wholly unnecessary burden upon the respondent and has in addition thereto improperly consumed the

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[1]Advance Report Citation: 144 A. C. A. 898.

[2]Advance Report Citation: 47 A. C. 115.

time of the courts which might well be devoting their efforts and time to matters which have not already been twice decided by the Supreme Court of California and the United States Supreme Court.

The judgment is affirmed, and pursuant to the provisions of rule 26a of the Rules on Appeal, and section 957 of the Code of Civil Procedure, the sum of $300 is assessed against the appellant and added to the costs as a penalty for the taking of a frivolous appeal.

WHITE, *P. J.*, and DORAN, *J.*, concurred.

Rule 23(j).

In the Superior Court of the State of California, in and for the County of Los Angeles.

Mae K. Howarth, Plaintiff, vs. Fred J. Howarth, Defendant.

No. Pasa. C 4121.

JUDGMENT.

The above-entitled cause came on regularly for trial on the 2nd day of June, 1955, before the Court, sitting without a jury, a jury having been expressly waived, William J. Donahue, Esq., appearing for plaintiff, and L. M. Cahill, Esq., appearing for defendant, and evidence both oral and documentary having been introduced, and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised:

WHEREFORE, by reason of the law and the findings of fact aforesaid, it is ORDERED, ADJUDGED, AND DECREED that the plaintiff do have and recover of and from the defendant the sum of $4,725.00 with interest thereon at the rate of seven (7) per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in said action amounting to the sum of $———.

Dated: August 19, 1955.

/s/ KENNETH C. NEWELL,
Judge of the Superior Court.